Lim Kwee Fen & Anor (trading under the name and style of HH Fresh Market) v KT Home Mart Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCvC-101–12 OF 2021
AMARJEET SINGH J
25 JULY 2022

Civil Procedure — Appeal — Record of appeal — Respondents sought appellants' appeal be struck out — Whether record of appeal was served within time — Whether record of appeal was served via electronic filing service — Whether memorandum of appeal which was not in record of appeal was filed within time — Rules of Court 2012 O 55 r 4 & O 62 r 6(1)

The subject matter of the appeal concerned the rights and obligations of the parties under a tenancy agreement. The sessions court dismissed the appellants' claim and allowed the respondent's counterclaim. On 6 December 2021 the appellants, within the time and in accordance with O 55 r 2 of the Rules of Court 2012 ('the ROC'), filed a notice of appeal at the sessions court against the whole decision of the sessions court judge. On 6 January 2022 the appellants filed, in accordance with O 55 r 4(1) of the ROC, the record of appeal at the High Court. On the same day the record of appeal was sent to the respondent's solicitors by way of email and the hardcopy of the record of appeal was subsequently, on 14 January 2022, left at the office of the respondent's solicitors. By a notice of application, the respondent sought for an order that the appellants' appeal was defective and incompetent and for the appeal be struck out on the ground that the record of appeal was not served within the time stipulated and that the record of appeal which was filed in court did not contain the memorandum of appeal as required by O 55 r 4 of the ROC. The appellants resisted the application claiming that the record of appeal was served on the respondent's solicitors in accordance with the rules and within the time stipulated and that the failure to include the memorandum in the record of appeal was merely an irregularity and not a nullity.

Held, allowing the application:

(1) The appellants' reliance on O 62 r 6(1)(cc) of the ROC as a mode of service was a futile act. The appellants argued that 'email' was a form of electronic communication envisaged by O 62 r 6(1)(cc) of the ROC and therefore the service by email on 6 January 2022 was valid. This was because the argument was based solely on the first part of the para (cc) which stated 'by means of electronic communication' which was

A accepted that an 'email' was one but completely ignored the second part which stated 'in accordance with any practice direction issued for that purpose.' However, the practice direction had not been issued yet and did not exist. Without the practice direction, the mode of service under para (cc) could not be affected. Therefore, the manner of service utilised by the B appellants did not fall within the mode envisaged in O 62 r 6(1)(cc) of the ROC. The appellant next justified that the service by email fell within O 62 r 6(1)(d) of the ROC. The condition precedent for the rule to apply was the existence of an agreement between counsel to that effect. It was clear that the solicitors did not enter into any agreement to serve the cause C papers by way of email. The manner of service carried out by the appellants did not fall within the ambit of O 62 r 6(1)(d) of the ROC (see paras 14–15 & 21).

(2) The appellants' submission that the record of appeal was also served by on D the respondent using the electronic filing service provided under O 63A r 17 of the ROC was devoid of merit. There is no provision in O 63A r 17 of the ROC which stated that the date of filing would also be the date of service of a document not required to be served personally under the rules. E-filing a document in court using the electronic filing service and E serving the same document or for convenience 'e-serving' the document using the same service were two different things. Obviously, the appellants did not serve the respondent using the electronic filing service and was relying on the date of the e-filing of the record of appeal as the date and time of the service of the record of appeal. Thus, the record of F appeal was not served via the electronic filing service (see paras 24 & 26–27).

(3) Order 55 r 4(1) was clear. If there was no memorandum of appeal the record was incomplete and was incompetent. The supplementary record G of appeal, if it was to be filed, was allowed to contain an amended memorandum of appeal and not a memorandum of appeal. The inclusion of the memorandum of appeal in the record of appeal, which was to be filed within one month of the filing of the notice of appeal, was intentional. It was admitted that the memorandum of appeal was on H 15 March 2022 included in the supplementary record of appeal. As such, the memorandum of appeal was by then two months and ten days out of time and without any application to extend time to file the memorandum of appeal out of time. Therefore, the record of appeal was served out of I time and the memorandum of appeal was not filed within time. Without the extension of time to regularise the irregularities the appeal was incompetent as there was no valid appeal before the court. In such circumstances the appeal would be struck out (see paras 31–34).

[Bahasa Malaysia summary

Perkara utama rayuan adalah berkenaan hak dan kewajipan pihak-pihak di bawah perjanjian penyewaan. Mahkamah sesyen menolak tuntutan perayu dan membenarkan tuntutan balas responden. Pada 6 Disember 2021 perayu-perayu, dalam masa dan mengikut A 55 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM'), memfailkan notis rayuan di mahkamah sesyen terhadap keseluruhan keputusan hakim mahkamah sesyen. Pada 6 Januari 2022 perayu memfailkan, mengikut A 55 k 4(1) KKM, rekod rayuan di Mahkamah Tinggi. Pada hari yang sama rekod rayuan telah dihantar kepada peguam responden melalui emel dan salinan cetak rekod rayuan kemudiannya, pada 14 Januari 2022, ditinggalkan di pejabat peguam responden. Melalui notis permohonan, responden memohon perintah bahawa rayuan perayu adalah cacat dan tidak kompeten dan rayuan itu dibatalkan atas alasan bahawa rekod rayuan tidak disampaikan dalam masa yang ditetapkan dan bahawa rekod rayuan yang telah difailkan di mahkamah tidak mengandungi memorandum rayuan seperti yang dikehendaki oleh A 55 k 4 KKM. Perayu-perayu menentang permohonan itu dengan mendakwa bahawa rekod rayuan telah disampaikan kepada peguam responden mengikut peraturan dan dalam masa yang ditetapkan dan bahawa kegagalan memasukkan memorandum dalam rekod rayuan hanyalah satu ketidakteraturan dan tidak membatalkan.

Diputuskan, membenarkan permohonan:

(1) Pergantungan perayu kepada A 62 k 6(1)(cc) KKM sebagai cara penyampaian adalah satu tindakan yang sia-sia. Perayu berhujah bahawa 'emel' adalah satu bentuk komunikasi elektronik yang dibayangkan oleh A 62 k 6(1)(cc) KKM dan oleh itu perkhidmatan melalui emel pada 6 Januari 2022 adalah sah. Ini kerana hujahan itu hanya berdasarkan bahagian pertama perenggan (cc) yang menyatakan 'melalui komunikasi elektronik' yang diterima bahawa 'emel' adalah salah satunya tetapi sama sekali tidak mengendahkan bahagian kedua yang menyatakan 'mengikut mana-mana arahan amalan yang dikeluarkan untuk tujuan itu.' Walau bagaimanapun, arahan amalan itu belum dikeluarkan dan tidak wujud. Tanpa arahan amalan, cara penyampaian di bawah perenggan (cc) tidak boleh digunakan. Oleh itu, cara penyampaian yang digunakan oleh perayu tidak termasuk dalam cara yang dibayangkan dalam A 62 k 6(1)(cc) KKM. Perayu seterusnya mewajarkan bahawa penyampaian melalui emel termasuk dalam A 62 k 6(1)(d) KKM. Syarat terdahulu untuk peraturan itu diguna pakai ialah wujudnya perjanjian antara peguam untuk maksud tersebut. Adalah jelas bahawa peguam tidak membuat sebarang perjanjian untuk menyampaikan kertas kausa melalui emel. Cara penyampaian yang dijalankan oleh perayu tidak termasuk dalam lingkungan A 62 k 6(1)(d) KKM (lihat perenggan 14–15 & 21).

(2) Hujahan perayu bahawa rekod rayuan juga telah disampaikan oleh responden menggunakan perkhidmatan pemfailan elektronik yang disediakan di bawah A 63A k 17 KKM adalah tidak mempunyai merit. Tiada peruntukan dalam A 63A k 17 KKM yang menyatakan bahawa tarikh pemfailan juga akan menjadi tarikh penyampaian dokumen yang tidak perlu disampaikan secara peribadi di bawah kaedah. E-filing dokumen di mahkamah menggunakan perkhidmatan pemfailan elektronik dan menyampaikan dokumen yang sama atau untuk kemudahan 'e-serving' dokumen menggunakan perkhidmatan yang sama adalah dua perkara yang berbeza. Jelas sekali, perayu tidak menyampaikan responden menggunakan perkhidmatan pemfailan elektronik dan bergantung pada tarikh e-filing rekod rayuan sebagai tarikh dan masa penyampaian rekod rayuan. Oleh itu, rekod rayuan tidak disampaikan melalui perkhidmatan pemfailan elektronik (lihat perenggan 24 & 26–27).

(3) Aturan 55 k 4(1) adalah jelas. Jika tiada memorandum rayuan, rekod itu tidak lengkap dan tidak kompeten. Rekod tambahan rayuan, jika hendak difailkan, dibenarkan mengandungi memorandum rayuan yang dipinda dan bukan memorandum rayuan. Kemasukan memorandum rayuan dalam rekod rayuan, yang akan difailkan dalam tempoh satu bulan selepas pemfailan notis rayuan, adalah disengajakan. Memorandum rayuan itu diakui pada 15 Mac 2022 dimasukkan dalam rekod rayuan tambahan. Oleh itu, memorandum rayuan pada masa itu adalah dua bulan dan sepuluh hari di luar masa dan tanpa sebarang permohonan untuk melanjutkan masa untuk memfailkan memorandum rayuan di luar masa. Oleh itu, rekod rayuan telah disampaikan di luar masa dan memorandum rayuan tidak difailkan dalam masa. Tanpa lanjutan masa untuk menyelaraskan ketidakteraturan rayuan itu adalah tidak kompeten kerana tiada rayuan yang sah di hadapan mahkamah. Dalam keadaan sedemikian, rayuan akan dibatalkan (lihat perenggan 31–34).]

Cases referred to

Chua Yam Quee v Peena Moona Mohamed Abdul Hameed & Anor [1950] 1 MLJ 141, CA (distd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149; [2009] 4 CLJ 329, FC (folld)

Gan Hay Chong v Siow Kian Yuh & Anor [1975] 2 MLJ 129, FC (refd)

Goh Kok Chong (sebagai wakil diri kepada Goh Kok Peng, si mati) & Anor v Hoe Kar Keong [2021] MLJU 2105; [2021] 1 LNS 1662, HC (distd)

Halim bin Sutarjo v KPMB Builder Bhd (formerly known as Konsortium Peladang (M) Bhd) [2005] 4 MLJ 273, HC (distd)

Lee Guat Eng v Tan Lian Kim [1985] 2 MLJ 196, SC (refd)

Raja Guppal a/l Ramasamy v Sagaran a/l Pakiam [1999] 2 MLJ 677; [1999] 2 CLJ 972, CA (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191, CA (refd)
Tong Kim Soo v Tirai Prospektif Sdn Bhd [2019] MLJU 946; [2020] 3 CLJ 353, CA (refd)

Legislation referred to

Rules of Court 2012 O 1A, O 2 r 1, O 55 rr 2, 4, 4(1), 4(2), 4(3), 4(4), 4(8), O 62 rr 1, 6(1), 6(1)(cc), 6(1)(d), 6(2), O 63A, O 63A r 17, O 92 r 4

Tan Zi Kang (Yeoh Shim Siow & Lay Kuan) for the applicant.
Lim Yee (Chieng & Lum Assoc) for the respondent.

Amarjeet Singh J:

INTRODUCTION

[1] By a notice of application dated 25 March 2022 (encl 8) the respondent sought for an order that the appellants' appeal is defective and incompetent and for the appeal be struck out on the ground that the record of appeal was not served within the time stipulated and that the record of appeal which was filed in court did not contain the memorandum of appeal as required by O 55 r 4 of the Rules of Court 2012 ('the Rules of Court 2012').

[2] On 7 July 2022, I allowed the application. This judgment contains the reasons for my decision.

THE KEY FACTS

[3] On 23 November 2021 the sessions court after a full trial dismissed the appellants' claim and allowed the respondent's counterclaim. It suffices to say that the subject matter of the appeal concerned the rights and obligations of the parties under a tenancy agreement. The appellants were the tenants.

[4] On 6 December 2021 the appellants, within the time and in accordance with O 55 r 2, filed a notice of appeal at the sessions court against the whole decision of the learned sessions court judge. On 6 January 2022 the appellants filed, in accordance with O 55 r 4(1), the record of appeal at the High Court. On the same day the record of appeal was sent to the respondent's solicitors by way of email. The hardcopy of the record of appeal was subsequently, on 14 January 2022, left at the office of the respondent's solicitors.

[5] The respondent filed encl 8 under O 92 r 4 contending firstly that the

service of the record of appeal on the respondent's solicitors was out of time by eight days and secondly that the record of appeal filed in court did not contain the memorandum of appeal. Thus, the appeal that was brought was defective and incompetent and therefore an abuse of the process of the court.

[6] The appellants vigorously resisted the application claiming that the record of appeal was served on the respondent's solicitors in accordance with the rules and within the time stipulated and that the failure to include the memorandum in the record of appeal was merely an irregularity and not a nullity. The appellants had elected to proceed on this course of action instead of regularising the irregularities. It was therefore incumbent on this court to determine encl 8 as argued by the parties.

WHETHER THE RECORD OF APPEAL WAS SERVED WITHIN TIME?

[7] The time for filing and serving the record of appeal is the same. The service of the record of appeal is provided by O 55 r 4(8) in the following words:

> The appellant shall within the time limited for the filing of a record of appeal serve each respondent with a copy of such record of appeal.

[8] The provision is mandatory. The record of appeal must be filed and served within the stipulated time. The principle that one act without the other (filing and serving a notice of appeal) renders the appeal incompetent that was held in *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191 applies with equal force in respect of the filing and serving of a record of appeal (see *Raja Guppal a/l Ramasamy v Sagaran a/l Pakiam* [1999] 2 MLJ 677; [1999] 2 CLJ 972).

[9] The time for serving the record of appeal is provided by O 55 r 4(8) which stipulates that the record of appeal must be served on the respondent within one month from the date of filing of notice of appeal. In the instant appeal that date would be 6 January 2022.

[10] The next question is how is the record of appeal to be served on the respondent. Order 62 r 1 provides that personal service is not required unless expressly provided for by the rules. The rules are silent on how the record of appeal is to be served. In such a case O 62 r 6(1) is triggered. This rule provides the mode of service in the following words:

> The service of any document, not being a document which in accordance with these Rules is required to be served personally, may be effected —
>
> (a) by leaving the document at the proper address of the person to be served;
>
> (b) by prepaid registered post;

(c) by facsimile in accordance with paragraph (3); A

(d) by means of electronic communication in accordance with any practice direction issued for that purpose; [inserted by PU(A) 351/2020]

(e) in such other manner as may be agreed between the party serving and the party to be served; or B

(f) in such other manner as the Court may direct.

[11] Order 62 r 6(2) provides that for the purpose of the rule, the proper address of any person on whom a document is to be served in accordance with this rule shall be the 'address for service' of that person. In the instant appeal the respondent's address for service, after the service of the notice of appeal without any objections, is at the business address of the respondent's present solicitors. C

[12] Thus, the record of appeal can be served by any of the modes described in O 62 r 6(1) at that address. The issue now is whether by sending the record of appeal by email on 6 January 2022 and following up by leaving a hardcopy of the record of appeal at the business address of the respondent's solicitors is one of the modes of service that is provided. D

E

[13] Counsel strenuously contended that the manner of service fell within the mode provided by O 62 r 6(1)(cc) or O 62 r 6(1)(d). Counsel for the respondent argued otherwise stating that what was done did not fall within the mode described in either of the paragraphs. F

Order 62 r 6(1)(cc)

[14] In my view the reliance on O 62 r 6(1)(cc) as a mode of service was a futile act. The appellants argued that 'email' was a form of electronic communication envisaged by O 62 r 6(1)(cc) and therefore the service by email on 6 January 2022 was valid. The argument was most unbecoming. This is because the argument is based solely on the first part of the para (cc) which states, 'by means of electronic communication' which I accept 'email' is one but completely ignores the second part which states, 'in accordance with any practice direction issued for that purpose'. Counsel could not say what the practice direction says because the practice direction has not been issued yet. It does not exist. In my view, without the practice direction, the mode of service under para (cc) cannot be affected. A valid service can only be made in accordance with such practice direction and one must wait until that happens. In the meantime, there can be no valid service by way of email under para (cc). In the circumstances, I had no hesitation in holding that the manner of service utilised by the appellants did not fall within the mode envisaged in O 62 r 6(1)(cc). G H I

Order 62 r 6(1)(d)

[15] Counsel next tried to justify that the service by email fell within O 62 r 6(1)(d). In my view the condition precedent for this rule to apply is the existence of an agreement between counsel to that effect. The agreement must be express and its terms specific and not vague. The court should not be left grappling with questions as to what the agreement means or does not mean. In the instant appeal, counsel conceded that there was no express agreement to serve the appeal papers by way of email.

[16] Counsel submitted that this court can imply an agreement from the conduct of the parties and contemporaneous documents as was held in *Chua Yam Quee v Peena Moona Mohamed Abdul Hameed & Anor* [1950] 1 MLJ 141 and *Halim bin Sutarjo v KPMB Builder Bhd (formerly known as Konsortium Peladang (M) Bhd)* [2005] 4 MLJ 273. These cases are distinguishable as they were not concerned with the interpretation of O 62 r 6(1)(d). They relate to the existence of a contractual relationship between two disputing parties and not what their lawyers agreed to as required by the rules.

[17] Counsel further submitted that the appellants' solicitors were serving cause papers using email since the initiation of the legal suit in the sessions court. Even if this was the case, the appellant had different solicitors then. The present solicitors only came into the picture at the appeal stage. In the instant appeal, the respondent's solicitors have denied the existence of any such agreement and denied the allegation of serving any cause papers by way of email in the instant appeal. I found the submission devoid of merit.

[18] Counsel then cited the case of *Goh Kok Chong (sebagai wakil diri kepada Goh Kok Peng, si mati) & Anor v Hoe Kar Keong* [2021] MLJU 2105; [2021] 1 LNS 1662 where the learned judge found that even if there was no prior consent to transmit the amended draft order using facsimile the act did not amount to a fundamental breach and O 1A would apply for that situation. That case is distinguishable from the instant appeal. The complaint there was the non-compliance with O 55 r 4(4) which concerned the inclusion or exclusion of documents for the purposes of the record of appeal. The learned judge found that the actual complaint was different and trivial concerning mere spelling errors that were not corrected and some documents not properly described by the appellant therein. The complaint therefore did not violate the essence of O 55 r 4(4) and one that can be readily excused by O 1A in the interest of justice.

[19] In my judgment O 62 r 6(1)(d) requires an express agreement preferably in writing by counsel. It cannot be implied given that the manner of service must be specific by virtue of the words 'in such other manner'. The

words 'in such other manner' when read with O 62 r 1 as a whole would exclude the earlier mentioned modes of service. This means that the manner of service envisaged by O 62 r 6(1)(d) is a manner different from the other paragraphs of the rule, namely: (a) leaving the document at the address for service; (b) prepaid registered post; (c) facsimile; and (d) electronic communication which in its sweep would include service by email. But as shown above service by electronic communication has not come into force as explained in para [14] above.

[20] In this regard estoppel does not apply where there is a violation of an express manner or mode of service for the consequences concern jurisdiction to hear an appeal. The failure of adhering to an express manner of service results in a jurisdictional defect. The appeal becomes incompetent as there is no proper appeal before the court. Incompetent appeals amount to an abuse of the process of the court.

[21] In view of the above, it is clear that the solicitors in this appeal did not enter into any agreement to serve the cause papers by way of email. I hold that the manner of service carried out by the appellants do no fall within the ambit of O 62 r 6(1)(d).

DECISION

[22] The burden is on the appellants to show that they have served the record of appeal in accordance with O 62 r 6(1)(cc) or O 62 r 6(1)(d). This, as shown above, they have failed to do. Therefore, the record of appeal was served on 14 January 2022. The record of appeal was out of time and in the instant and rendered the appeal incompetent and therefore an abuse of the process of the court. For this reason, the appeal is struck out. The appellants could have elected to regularise the record of appeal filed out of time but elected to argue that the service was valid.

Whether record of appeal was served via electronic filing service?

[23] The electronic filing service was introduced for electronically filing court documents. O 63A governs the e-filing of documents in court. By way of further amendment to O 63A *vide* PU(A) 251/2020 which came into operation on 15 December 2020, a new rule was inserted, namely, O 63A r 17 which now provides for the service of documents using the electronic filing service.

[24] The appellants apart from their earlier submission that the record of appeal was served by way of O 62 r 6(1)(cc) or O 62 r 6(1)(d) submitted that the record of appeal was also served by on the respondent using the electronic

filing service provided under O 63A r 17. The contention advanced by counsel is this: 'the record of appeal is deemed served by the appellants' solicitors on the respondent's solicitors on 6 January 2022, the date of which the record of appeal is received in the court's computer system'.

[25] The starting point is O 63A r 17 which provides as follows:

> (1) *If a document —*
>
> (a) *other than a document which is required by these Rules to be served personally*; or
>
> (b) being a document which is required by these Rules to be served personally and which the party to be served has agreed for the document to be served using the electronic filing service,
>
> is required under any other provision of these Rules to be served to any person and that person is a registered user or is represented by a solicitor who is also a registered user (referred to in these Rules as the person on whom the document is served), *such service may be affected by using the electronic filing service* subject to any direction of the Court or any practice direction for the time being issued for that purpose.
>
> (2) For the purposes of subparagraph (1)(b), a party who has instructed his solicitor to accept service of a document which is required by these Rules to be served personally shall be deemed to have agreed to be served using the electronic filing service.
>
> (3) *The document shall be deemed to be served by electronic transmission from the computer system of the registered users on the date and at the time that the first part of the transmission is received in the Court's computer system.*
>
> (4) The person serving the document *may produce a record of the service to the person on whom the document is served which is issued by the Court's computer system* or the service bureau *as evidence of the service,* as well as the date and time of such service.
>
> (5) *The person serving the document may file proof of service through the electronic filing service.*
>
> (6) Where a document has to be served by the person serving the document to more than one person, he may effect such service using the electronic filing service on such persons who are registered users and paragraphs (1), (3), (4) and (5) of this Rule shall apply accordingly with the necessary modifications. (Emphasis added.)

[26] I find the submission of counsel devoid of merit. There is no provision in O 63A r 17 which states that the date of filing would also be the date of service of a document not required to be served personally under the rules. Order 63A r 17 provides for a new mode of service, that is to say, service of documents between the parties' solicitors, both of whom must be registered users of the electronic filing service. This means the solicitor who is required to serve a document will use the electronic filing service to serve the document on the solicitor who is to be served. The solicitor served is deemed to be served by electronic transmission on the date and at the time that the first part of the

electronic transmission is received in the court's computer system. A record of the service is issued by the court's computer system as evidence of the service. The solicitor serving the document may provide this record of service to the solicitor being served the document and such proof of service may be filed through the electronic filing service.

[27] E-filing a document in court using the electronic filing service and serving the same document or for convenience 'e-serving' the document using the same service are two different things. Obviously, the counsel did not serve the respondent's solicitors using the electronic filing service and is relying on the date of the e-filing of the record of appeal as the date and time of the service of the record of appeal. This was not envisaged or is the purpose O 63A r 17 was introduced. Thus, I hold that the record of appeal was not was served *via* the electronic filing service.

Failure to include memorandum of appeal in the record of appeal

[28] The memorandum of appeal was not included in the record of appeal. This omission violates O 55 r 4 which provides as follows:

> (1) In the case of an appeal from a decision after trial, the appellant shall within one month from the date of filing of notice of appeal prepare and file the requisite number of copies of the record of appeal in the High Court and the record shall contain copies of —
>
> (a) the relevant pleadings;
>
> (b) the notes of evidence, including witness statements, if available, recorded wholly or partly by mechanical means;
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> (c) the grounds of judgment, if available;
>
> (d) the memorandum of appeal;
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> (e) the decision, order or judgment;
>
> (f) a duplicate copy of the notice of appeal;
>
> (g) a duplicate copy of the notice of cross appeal, if any;
>
> (h) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of the appeal:
>
> *Provided that the record of appeal shall be filed notwithstanding that the notes of evidence and/or grounds of judgment are not ready or that the sealed decision, order or judgment has not been extracted.*
>
> (2) In the event the notes of evidence and/or grounds of judgment are not ready or the sealed decision, order or judgment has not been extracted within the period specified in rule 4(1) above, *then the notes of evidence and/or grounds of judgment, where they are made available and a copy of the sealed decision, order or judgment when*

extracted, shall be filed by way of a supplementary record of appeal without leave of the High Court:

Provided also that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal.

(3) The memorandum of appeal shall be substantially in Form 112 and shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively. Notwithstanding rule 8 of this Order, where a supplementary record of appeal is to be filed pursuant to rule 4(2) above, *the appellant may if necessary also include in the supplementary record of appeal an amended memorandum of appeal, without leave of the High Court.* (Emphasis added.)

[29] Order 55 r 4(1) is a mandatory provision. It clearly states that one of the documents to be included in the record of appeal is the memorandum of appeal. The record of appeal must be filed notwithstanding that the notes of evidence and/or grounds of judgment are not ready or that the sealed decision, order or judgment has not been extracted. These three documents are allowed to be filed by way of a supplementary record of appeal when made available *without the leave of the High Court.* This is expressly stated in O 55 r 4(2) which is reproduced in the preceding paragraph.

[30] Order 55 r 4(3) allows for an amended memorandum of appeal to be filed where a supplementary record of appeal is filed. For this purpose, the rule expressly state that no leave of the High Court is required. The rules are very specific as to which documents can be filed in the supplementary record of appeal without the leave of court. The memorandum of appeal is not one of these documents.

[31] In my judgment O 55 r 4(1) is clear. If there is no memorandum of appeal the record is incomplete and is incompetent. The supplementary record of appeal, if it is to be filed, is allowed to contain an amended memorandum of appeal and not a memorandum of appeal. The inclusion of the memorandum of appeal in the record of appeal, which is to be filed within one month of the filing of the notice of appeal, was intentional. It matters not a jot if at the grounds of judgment is not ready at the time the record of appeal is to be filed.

[32] In the instant appeal it is admitted that the memorandum of appeal was on 15 March 2022 included in the supplementary record of appeal. As such, the memorandum of appeal was by then two months and ten days out of time and without any application to extend time to file the memorandum of appeal out of time. The cases are clear on the subject: (a) that the time frame for filing appeal documents are mandatory; (b) the non-compliance as to time is treated as an irregularity; and (c) to regularise the irregularity as to time with an

application for extension of time (see *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (PC); *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129 (FC); *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196 (SC)). A

[33] In view of the above, I hold that the record of appeal is served out of time and the memorandum of appeal is not filed within time. B

[34] Without the extension of time to regularise the irregularities the appeal is incompetent as there is no valid appeal before this court. In such circumstances the appeal would be struck out. The appellants had the opportunity and should have elected to regularise the memorandum of appeal that was filed out of time but elected to argue that by including the memorandum of appeal in the supplementary record of appeal is sufficient. C

[35] The appellants argued that the appeal has not been set down for hearing and there was no injustice suffered by the respondent. They relied on O 1A which states that the court should have regard to the overriding interest of justice and not only to the technical non-compliance with the rules and O 2 r 1 which states any non-compliance with the requirement of the rules should be treated as an irregularity and shall not nullify the proceedings. D E

[36] As shown above, non-compliance with the rules especially with regard to time to file and serve appeal documents are mandatory. The failure to file or serve within the time stipulated are treated as an irregularity and the court is not to nullify the appeal straightaway. In *Tong Kim Soo v Tirai Prospektif Sdn Bhd* [2019] MLJU 946; [2020] 3 CLJ 353 the Court of Appeal said that the court should not dismiss the appeal without giving the litigant an opportunity to regularise the record of appeal and the memorandum of appeal which were filed out of time. Again, like the cases alluded to above, the burden is on the appellant who is out of time to regularise the non-compliance. F G

[37] In this regard the decision of the Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149; [2009] 4 CLJ 329 is binding on me. The ratio decidendi in that case is that O 1A cannot be used to supersede a mandatory requirement of the rules. O 55 r 4 is certainly one such rule. H

[38] Likewise, with regard to O 2 r 1, the failure to include the memorandum of appeal in the record of appeal could be regularised and not treated as a nullity as held in *Tong Kim Soo.* An application to extend time to file the memorandum of appeal out of time would be the prudent and only course. However, in the instant appeal the position taken by the appellants is that there is no need to regularise the record of appeal or the memorandum of appeal. The I

bottom line is that is the right of the appellants and this court should not interfere with their election.

[39] One further point is to be put straight. The respondent's solicitors had on 9 March 2022 during e-review raised the issue of the memorandum of appeal not being part of the record of appeal. This was after the appellants' solicitors had orally requested for more time to file the memorandum of appeal.

CONCLUSION

[40] For the above reasons, I hold that the record of appeal is incompetent. The record of appeal is not served within the time stipulated on the respondent and the memorandum of appeal which is not in the record of appeal is clearly out of time. In absence of an application to regularise the non-compliance by way of an application of extension of time the appeal is incompetent. There is no proper appeal before this court. In the circumstances, I allow encl 8 and the appeal is struck out.

Application allowed.

Reported by Nabilah Syahida Abdullah Salleh